IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 848 28

THE BROTHERHOOD OF RAILROAD TRAINMEN, ENTERPRISE LODGE NO. 27, ET AL.,
Petitioners,

vs.

TOLEDO, PEORIA & WESTERN RAILROAD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent urges that the Petition for Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied.

Jurisdiction.

We concede the jurisdiction of this Court under the Certiorari Act to consider a petition for Writ of Certiorari in this case.

Exercise of Jurisdiction.

But we contend that the case at bar presents no circumstances which warrant the grant of Certiorari in this cause since the petition shows that the petitioners are seeking *"another hearing"*. (*Magnum Co.* v. *Coty*, 262 U. S. 159; 43 S. Ct. 531.)

We further contend that consideration of a petition for Certiorari is limited to questions specifically presented by the petition; the supporting brief is not a part of the petition, at least for the purpose of stating the questions on which relief is sought. (*Rule 38, Paragraph 2, 28 U.S.C.A.*; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175 at 177, 58 S. Ct. 849 at 851; *Crown Cork and Seal Co.* v. *Ferdinand Gutmann Co.*, 304 U. S. 159, at 161, 58 S. Ct. 842 at 843.)

Petitioners argue some questions in their brief which are not stated in the petition.

Reasons Urged in Petition for Writ of Certiorari to Review the Decree and Judgment of the Circuit Court of Appeals in Favor of the Respondent.

Petition at pages 5-6 suggests four questions for the consideration of this Court, and at page 6 states reasons relied on for allowance of the writ.

(1) The first question suggested is, the effect of the order of the District Court extending the temporary restraining order during the hearing on application for temporary injunction.

(2) The second question is, that of the existence of a federal question and jurisdiction of the subject matter vesting jurisdiction in the Federal Courts.

(3) The third question is, whether there is substantial evidence in support of the findings of fact upon the question of whether the public officers were unable or unwilling to furnish adequate protection for respondent's property as a condition precedent to an injunction, as required by the terms of Section 7 (e) (Sec. 107, Title 29 U.S.C.A.) of the Norris-LaGuardia Act.

(4) The fourth question is, whether the facts show that respondent failed to exercise reasonable efforts to settle the dispute with the aid of governmental machinery, as required by Section 8 (e) (Sec. 108, Title 29 U.S.C.A.) of the Norris-LaGuardia Act.

Respondent's Answer to Petition and Reasons Relied Upon for Denial of Writ of Certiorari.

1. Respondent has three answers to the first question:—

(a) The Statute, Title 29, U.S.C.A., Sec. 107, limits a temporary restraining order to five days where it is issued *without notice*. There is no limitation under the provisions of the Statute upon the validity of a restraining order granted *after notice*. The orders complained of extending the temporary restraining order were all entered *with notice to petitioners and their counsel during the course of hearing upon application for temporary injunction*. Each of the orders recited the reasons for the extension. (R. 66-67, 68-71, 965-966).

(b) The original temporary restraining order signed on January 3rd, 1942 at 3:50 P. M., expired on January 8th, 1942 at 3:50 P. M. (R. 50-60). The hearing on the application for temporary injunction was set for January 8th, 1942 at 10:00 A. M. (R. 60), prior to the expiration

of the temporary restraining order. The hearing began as scheduled and continued without interruption (except for the usual court recesses) until January 19, 1942 at 5:00 P. M. (R. 68, 954), when temporary injunction was entered (R. 982).

During the first day of the hearing, and before the expiration of the temporary restraining order, the Court determined that the case could not be concluded for several days, and at 3:15 P. M. on that day, an order was entered extending the effect of the temporary restraining order to January 17th, 1942 at 3:15 P. M. (R. 66). (A further discussion of the facts relating to both extensions will appear in respondent's reply to petitioner's argument.)

(c) The temporary restraining order was merged in the temporary injunction, the latter having been issued after due notice and a full hearing.

2. Respondent's answers to the second question are:

(a) Original jurisdiction in law and equity cases was vested in the District Court by Congress by Title 28, U.S.C.A., Section 41 (8), in all suits and proceedings arising under any law regulating commerce.

(b) The original jurisdiction of the District Court of the subject matter of this suit is based upon issues involving federal questions under the following statutes: "An Act to Regulate Commerce", and acts amendatory and supplementary thereto; Title 49 U.S.C.A., Transportation Act of 1920, as amended, Title 49 U.S.C.A., and the rights and duties of respondent under the provisions of the Railway Labor Act, as amended, Title 45 U.S.C.A., Sections 151-160; also Title 18 U.S.C.A., Section 412 (a). A determination of the rights and duties of the parties to this suit necessarily required a construction of the meaning and application of such acts by the District Court, as

well as the Norris-LaGuardia Act, to the facts shown in the record.

(c) Equity jurisdiction in cases arising under the Railway Labor Act was recognized by this Court in *Texas & N. O. R. Co., et al.* v. *Brotherhood of Railway and S. S. Clerks*, 281 U. S. 548, 50 S. Ct. 427, and *Virginian Ry. Co.* v. *System Fed. No. 40*, 300 U. S. 515, 57 S. Ct. 592.

3. The answers of respondent to questions 3 and 4 above, which relate to questions of fact found adversely to petitioners by the District Court and the Circuit Court of Appeals, are:

(a) That the evidence as to acts of violence and destruction of property and cessation of movement in interstate commerce on respondent's railroad was uncontradicted.

(b) Substantial evidence was offered by respondent proving that the public officers were unable or unwilling to furnish adequate protection for respondent's property and its employees, as required by Section 7 (e) (Sec. 107, Title 29 U.S.C.A.) Norris-LaGuardia Act, and the District Court (R. 970-975) and the Circuit Court of Appeals (R. 1028-1029) concur in the finding of fact that this condition precedent was proved by substantial evidence.

(c) That the evidence of respondent showing a compliance with all the provisions of the Railway Labor Act (Title 45 U.S.C.A.) with reference to mediation and arbitration was undisputed.

(d) That the evidence of respondent shows that it in all respects complied with all the requirements of Sec. 8 (Sec. 108 Title 29 U.S.C.A.) of the Norris-LaGuardia Act. No evidence was offered to the contrary.

(e) The District Court made specific findings of fact on all of these factual questions (R. 970-976) and the Circuit Court of Appeals found the facts in accord with the

District Court (R. 1026, 1028-1029). The concurrent findings of fact of the two Courts below are not shown to be erroneous or unsupported by the evidence, and under the decisions of this Court are accepted as unassailable.

(f) The certiorari jurisdiction of this Court is not exercised simply to grant another hearing to petitioners.

Summary and Statement of Issues Involved.

Petitioners' summary and statement (pp. 1-5) is inaccurate and inadequate, and is corrected by the following:

The petition for certiorari is to review the judgment of the Seventh Circuit Court of Appeals affirming a judgment for temporary injunction entered by the District Court restraining petitioners from interfering with respondent, an interstate common carrier, by violence or threats of violence in the transportation of interstate freight.

The order for the temporary injunction in no way interfered with the rights of the striking employees to pursue peaceful picketing, nor did it interfere with other rights as such employees, *but only restrained them from violent acts against the employees and the property of the respondent, the interstate carrier.* (Order for Injunction, R. 977-982; Findings of Fact, 970-977; oral decision of trial judge, 954-957.)

Respondent is an interstate common carrier operating a railroad from Keokuk, Iowa, to Effner, Indiana. Approximately one hundred conductors, engineers and firemen went on a strike December 28, 1941, at 6 P.M., and immediately acts of violence were committed in nine of the eleven counties in Illinois through which this railroad extends, resulting in serious injury to many employees, destruction of property, interference with the movement

of interstate trains, interference and stoppage of the movement of war materials, all of which resulted in an absolute cessation and total abandonment of the operation of the railroad and the movement of interstate commerce and war materials from Friday night, January 2, 1942, to Sunday morning, January 4, 1942.

Attached to this answer and brief as an appendix is a reproduction of Respondent's (Plaintiff's) Exhibit 21 admitted in evidence (R. 699, 702-709).

A glance at this exhibit will show that more than fifty acts of violence were committed by petitioners from the beginning of the strike December 28, 1941, until the granting of the restraining order January 3, 1942. The situs of the acts of violence are indicated on this exhibit by red dots. This exhibit also discloses the movement of all trains day and night during the period above referred to and the numerous points along said railroad where these acts of violence were committed.

The only defense made by petitioners in the trial of this case, on the merits, consisted of the testimony of various members of the Brotherhoods who denied their personal participation in various incidents where the respondent's witnesses had testified to acts of violence. There was no denial by the petitioners of the fact that these incidents actually occurred, but the defense was limited simply to testimony by certain individuals who attempted to deny their identification and participation in certain acts or incidents where violence was committed. The trial court as indicated by his ruling did not believe the testimony of the petitioners and their witnesses, and in practically every case held with respondent on the question of fact as to who actually participated in each incident where violence was shown.

In other words, the trial judge did not believe the testimony with reference to the alibi which was made in this

case by petitioners, which was the kind that usually appears in criminal cases. Several members of the Brotherhood who were identified in serious acts of violence, did not testify in their own behalf.

Not only did the trial court find practically all of the Brotherhood officers and members who were defendants to the injunction proceedings, guilty of violence, (R. 957-958), but the Circuit Court of Appeals, in the last paragraph of the opinion, found that the participation in the acts of violence by the officers of the union, as well as many members, was established by clear proof of actual participation. (R. 1031)

The statement in petition (page 3) that "plaintiff did not cease operation of its railroad but there were some temporary delays" is not a true statement of the facts. The District Judge found as a fact (R. 970-977) specific instances of violence committed by petitioners and interference with the movement of interstate commerce, not only upon respondent's railroad but also upon movement of interstate commerce over other connecting carriers, and that many cars of interstate freight consigned to respondent by connecting carriers were delayed and delivery prevented by reason of the acts and threats of violence toward employees not only of respondent but also of other railroads.

The Circuit Court of Appeals found (R. 1021-1031) that respondent's workers were assaulted, moving trains stoned, trains derailed, windows and lights on the locomotives and cabooses broken, trains stopped and many threats made against respondent's employees, and on one occasion the throwing of a bottle of inflammable liquid into the engine cab of a moving train, causing fire and injury to the occupants.

The Circuit Court of Appeals also found (R. 1026) that the acts complained of were so violent that plaintiff was

forced to abandon temporarily its train service; that the violence and threats of violence spread over the entire distance of the length of the railroad from Iowa through Illinois to Indiana (R. 1028).

Reference to the written Findings of Fact signed by the District Judge when the temporary injunction was issued (R. 970-977) will show that the court made a specific finding of fact on each of the allegations of violence as set forth in the complaint, and these findings of fact were affirmed by the decree of the Circuit Court of Appeals.

Petitioners state (pages 3 and 4) that the evidence is insufficient to support the findings that the public officials charged with the enforcement of law were unable or unwilling to perform that duty.

Petitioners offered no testimony disproving the testimony of respondent on the question of the inability or unwillingness of the officers of the law to protect the property and employees of the respondent, and there is no serious conflict in the testimony except in several minor incidents developed on cross-examination.

The testimony offered by respondent on this question was not denied by a single witness called on behalf of petitioners. The District Judge made specific findings of fact (R. 975) that the public officers charged with the duty of protecting respondent's property were unwilling or unable to furnish adequate protection. The Circuit Court of Appeals affirmed that finding in its opinion (R. 1028), and recites the summary of evidence to which respondent refers for the statement of facts on that question. These findings of the lower courts were supported by substantial evidence.

The petition does not accurately and adequately set forth the facts with reference to the efforts of respondent to settle a labor dispute with the petitioners.

In October, 1940, as a result of elections held with the consent of respondent, the Brotherhoods became the representatives of the train service employees of respondent. These elections were duly held under the Railway Labor Act and supervised by a mediator of the National Mediation Board.

At all times subsequent to the selection of the Brotherhoods as representatives of the train service employees, respondent recognized and negotiated with these representatives for the men, and with no other persons (R. 775).

The purpose of these negotiations was to negotiate a contract with the Brotherhoods representing train service employees. No contract with the Brotherhoods existed prior thereto for many years.

On November 21, 1941, after both parties to the dispute had refused to arbitrate, the Mediation Board terminated its mediation efforts in the manner prescribed by the statute. (Title 45, U.S.C.A., Sec. 155.) The mediator left Peoria, and mediation proceedings were terminated in the manner prescribed by statute. Following that date, respondent urged the Mediation Board, by exchange of telegrams, to recommend the appointment of an emergency board to be appointed by the President, as provided in the Railway Labor Act, but this was not done. No further mediation was had, and the statement in petition (page 2) that "negotiations were resumed, but an agreement was not reached" is untrue, and is not in any way supported by any evidence in the record.

Petitioners offered no evidence upon the trial, oral or documentary, in any way contradicting the testimony of respondent's witnesses who had attended all conferences and negotiations between the parties from October, 1940, until the day of the filing of the complaint.

A clear statement of the facts on this question is made in the opinion of the Circuit Court of Appeals (R. 1030-1031).

A further discussion on this point will follow in the brief in support of this answer.

BRIEF AND ARGUMENT IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

Reference is made in the petition to the opinion of the Seventh Circuit Court of Appeals, as reported in 132 F. (2d) 265, and also set forth at R. 1020. Respondent also directs the court's attention to the oral statement of the trial judge at the conclusion of the case and before the signing of the findings of fact and the order for temporary injunction (R. 954-958).

SUMMARY OF ARGUMENT OF RESPONDENT IN REPLY TO SUMMARY OF ARGUMENT OF PETITIONERS ON PAGES TEN AND ELEVEN OF PETITION.

I.

The trial of the application for temporary injunction was begun before the expiration of the temporary restraining order, and the court had power to extend the temporary restraining order during the progress of the trial with notice to petitioners and their counsel who were present participating in the trial when the extension orders were made.

Section 7 (Sec. 107 Title 29 U.S.C.A.) of the Norris-LaGuardia Act relates only to temporary restraining orders entered *without notice.*

Congress (by Section 7) did not limit the District Court's jurisdiction to enter restraining orders in labor disputes in excess of five days where there is notice, or after a hearing.

Both of the extensions were made after notice and a hearing, to preserve the *status quo* of the property during the hearing of the application for a temporary injunction.

The temporary restraining order was merged in the temporary injunction, the latter having been issued after due notice and a full hearing.

II.

Original jurisdiction in law and equity cases was vested in the District Court by Congress by Title 28 U.S.C.A.

Sec. 41 (8), in all suits and proceedings arising under any law regulating commerce.

The complaint upon its face shows that the injunction prayed for was to restrain petitioners from committing acts of violence and threats of violence, thereby interfering with and preventing the transportation of interstate commerce, and the discharge of the obligations of respondent as an interstate carrier to furnish interstate transportation as required by the Interstate Commerce Act. Section I, (4), (6), (11), (18), (19), (20), Title 49 U. S. C. A.

The District Court had original jurisdiction without regard to the diversity of citizenship or the amount involved, because all the issues are federal questions relating to interstate commerce.

The District Court had jurisdiction under the Railway Labor Act (Title 45 U.S.C.A., Sec. 151-160) because it is provided therein that all interstate common carriers by railroad are included within the provisions of that Act.

The right asserted by respondent to be free from violent interference of its business as an interstate carrier is created by the Federal Constitution and statutes, and not by the state law, and the determination of the result of the case depends upon the construction and application of the Federal Constitution and statutes.

Congress in passing the Interstate Commerce Act in 1887, and by the amendments thereto, assumed exclusive jurisdiction in determining the duties and obligations of carriers of interstate freight, and no court, state or federal, has ever held that any of the duties and obligations of an interstate carrier under that act are subject to state legislation, or regulation by the state.

III.

The clear and conclusive evidence offered by respondent shows that the public officers charged with maintaining order were unable or unwilling to furnish adequate protection for respondent's employees and its property against the violence and threats of violence of petitioners.

The District Court made a specific finding of fact (R. 975), that the evidence proved the failure, inability or unwillingness of the public officers to furnish adequate protection to the property of respondent, and the movement of its trains, and the Circuit Court of Appeals has concurred in that finding (R. 1028-1029).

The concurrent findings of fact of the two lower courts, not shown to be plainly erroneous or unsupported by substantial evidence, are, under the well established rule, accepted by this Court as unassailable.

IV.

The undisputed evidence offered by respondent shows that it complied with all the obligations imposed upon it by the Railway Labor Act, and by Section 8 (Sec. 108, Title 29 U.S.C.A.) Norris-LaGuardia Act.

The District Court made a specific finding of fact (R. 970) that the evidence of respondent proved that respondent by negotiation and mediation complied with the provisions of the Railway Labor Act, and all other laws relating to labor disputes in an honest effort in good faith to reach an agreement with the Brotherhoods, and the Circuit Court of Appeals concurred in that finding (R. 1029-1031).

The concurrent findings of fact of the two lower courts, not shown to be plainly erroneous or unsupported by

substantial evidence, are, under the well established rule, accepted by this Court as unassailable.

Neither the Railway Labor Act nor the Norris-La Guardia Act required respondent to submit to compulsory arbitration to show a compliance entitling it to injunctive relief; respondent fully complied in good faith with all requirements of laws relating to labor disputes by negotiation, mediation and the request for the appointment of an emergency board.

Respondent made no change in its rates of pay, rules and working conditions until more than thirty days after the termination of the mediation proceedings by the National Mediation Board, and in that respect fully complied with Section 5 (Sec. 155 Title 45 U.S.C.A.) Railway Labor Act.

The District Court and the Circuit Court of Appeals concur in findings of fact that petitioners were guilty of violence and threats of violence in obstructing the transportation of interstate freight; and the provisions of Section 8 (Sec. 108, Title 29 U.S.C.A.) Norris-LaGuardia Act do not apply where acts of violence and threats of violence and destruction of property are committed by employees.

The findings of the District Court and the Circuit Court of Appeals that respondent was not required to arbitrate is in accordance with the first paragraph of Section 7, (Sec. 157, 45 U.S.C.A.) Railway Labor Act. which provides:

> "Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy

may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided*, however, *That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter* or otherwise." (Italics ours.)

Such findings also complied with the provisions of Section 8, (Sec. 108, Title 29, U.S.C.A.) Norris-LaGuardia Act, which provides:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid *of any available governmental machinery of mediation or voluntary arbitration.*" (Italics ours.)

RESPONDENT'S REPLY TO PETITIONERS' ARGUMENT.

I.

The District Court properly extended the temporary restraining order after notice during the hearing of the application for temporary injunction, and the temporary restraining order was merged in the temporary injunction.

Section 7 (Sec. 107, Title 29 U.S.C.A.) of the Norris-LaGuardia Act relates only to orders entered without notice. Congress did not limit the District Court's jurisdiction to enter restraining orders in labor disputes in excess of five days where there was notice or a hearing.

The temporary restraining order was entered without notice, limited for a period of five days, expiring January 8, 1942 at 3:50 o'clock P. M. Application for temporary injunction was set for hearing January 8, 1942 at 10:00 o'clock A. M. (R. 50-60). Notice of such hearing was served upon petitioners and the public officials of the counties, cities and villages interested (R. 64-65). On January 8, 1942 at 10:00 o'clock A. M. respondent in open court began the presentation of its evidence in support of the application for temporary injunction. The hearing continued without interruption (except usual court recesses) until the case was concluded and the order for temporary injunction entered on January 19, 1942, after the District Court had heard a total of 82 witnesses for respondent and 25 witnesses for petitioners.

On January 8, 1942 at 3:15 o'clock P. M. the District Court, after hearing a portion of the evidence and deter-

mining that the hearing of the application for temporary injunction could not be concluded and a decision rendered thereon before the expiration of the temporary restraining order, entered an order extending and continuing in full force and effect such temporary restraining order for a period of nine days, that is, until January 17, 1942 at 3:15 o'clock P. M. The order extending such temporary restraining order was presented to Louis F. Knoblock, one of the petitioners' counsel, at 2:15 o'clock P. M. January 8, 1942, one hour before it was entered (R. 66-67).

On January 16, 1942, the hearing of the application for temporary injunction not having been completed the District Judge entered a further order extending and continuing in force the temporary restraining order until 5:00 o'clock P. M. January 19, 1942, the order reciting the reasons therefor (R. 965-966).

Both of the above orders extending and continuing in force the temporary restraining order were entered with notice to petitioners and their counsel, *who were present in court at the time of the entry of each order.*

Section 7 (Sec. 107, Title 29 U.S.C.A.) of the Norris-LaGuardia Act does not prohibit the District Court from extending the operation of a temporary restraining order, where the extension order is entered with notice or after notice. Both orders specifically recite the reasons for entering the same (R. 66-67, 965-966). These orders to protect employees and property of respondent while the court was hearing the application for temporary injunction were made with full notice to petitioners and after a hearing, and objections thereto in open court (R. 66-68, 965-966).

Petitioners at no time questioned the validity of the original temporary restraining order entered January 3, 1942, nor did they at any time move to vacate the same.

The opinion of the Circuit Court of Appeals (R. 1022-1023) clearly shows the purpose and intent of Section 107, Title 29 U.S.C.A. and the necessity as a practical application of the law of extending and keeping in force the temporary restraining order until the completion of the hearing and decision on the application for a temporary injunction.

If the Court had not extended the effect of the temporary restraining order during the hearing there would have been a period of more than a week during which petitioners, if unrestrained, might have caused further irreparable damage.

Petitioners state (Pet. p. 2) that contempt proceedings were later brought in the District Court, but fail to state that *no contempt proceedings were instituted under the temporary restraining order.* Respondent stated in its brief in the Circuit Court of Appeals, and here again states, that it has no knowledge or proof of any direct violations of the temporary restraining order at any time between January 8, 1942 and January 19, 1942.

The contempt proceedings were instituted for violation of the temporary injunction, and this additional statement is made by respondent to correct any misconception of the facts which might be obtained from a reading of the petition.

In addition thereto the temporary restraining order was merged in the temporary injunction as specifically held in *City of Reno* v. *Sierra Pacific Power Co.*, 44 F. (2d) 281-283 (CCA 9th Circuit) and by the Circuit Court of Appeals in this case (R. 1023).

Petitioners (Pet. p. 13) say that if the restraining order was void between January 8, 1942 and January 19, 1942, it will not sustain contempt proceedings that may be brought, and the issue is alive and should be determined

by this Court. In reply to this statement, respondent says that no contempt proceedings have at any time been instituted by respondent for violation of the temporary restraining order or for violation of either of the extensions thereof, and respondent has no knowledge or proof of any violations of the temporary restraining order or extensions at any time during the period between January 8, 1942 and January 19, 1942, and that no contempt proceedings thereunder are contemplated.

II.

The complaint shows upon its face that the injunction prayed for was to restrain petitioners from committing acts of violence and threats of violence, and thereby interfering with and preventing the transportation of interstate commerce and the discharge of the obligations of respondent as an interstate carrier to furnish interstate transportation. The District Court had jurisdiction of the subject matter because all of the issues involved federal questions.

The complaint of respondent alleged facts showing that it was an interstate common carrier of freight by railroad subject to the provisions of an Act entitled, "An Act to Regulate Commerce," and acts amendatory and supplementary thereto, Title 49 U.S.C.A., and the Transportation Act of 1920, as amended, Title 49 U.S.C.A., and as a common carrier subject to the Railway Labor Act, Title 45 U.S.C.A., Sections 151-160, the War Utilities Act, Title 50 U.S.C.A., Sections 101, 102, 103, 104 & 105 (R. 4), and that jurisdiction of the court was invoked because of the rights given it by the Constitution and Laws of the United States (R. 28).

Under Section 1 (4) of the Interstate Commerce Act it is the duty "of every common carrier * * * to provide and

furnish * * * transportation * * * to establish through routes * * * and to provide reasonable facilities * * *" etc.; under Section 1 (6), "to establish * * * facilities for transportation * * *, which may be necessary or proper to secure the safe and prompt receipt, handling, transporting and delivery of property * * *"; under Section 1 (4) "to provide and furnish transportation upon reasonable request therefor * * * to provide reasonable facilities for operating such routes"; under Section 1 (11) "to furnish a safe and adequate car service"; under Section 1 (18) "* * * no carrier by railroad subject to this Chapter shall abandon all or any portion of a line of railroad or the operation thereof, unless and until there shall have first been obtained from the Commission a certificate that the present or future public convenience permits such abandonment"; under Section 1 (20) it is provided "any * * * abandonment contrary to the provisions of this Paragraph (or Paragraphs 18 and 19 of this Section) may be enjoined * * *."

By Section 151, Title 45, U.S.C.A., it is provided that all interstate common carriers are included within the provisions of the Railway Labor Act. That Act applies only to interstate common carriers by railroad under the jurisdiction of the Interstate Commerce Commission and subject to the Act to Regulate Commerce.

Section 41 (1), 28 U.S.C.A., provides that District Courts shall have original jurisdiction "of all suits of a civil nature, at common law or in equity, * * * (a) * * * under the Constitution or laws of the United States * * *"; and sub-section (8) provides "all suits and proceedings arising under any law regulating commerce."

In *Peyton* v. *Railway Express Agency*, 316 U. S. 350, at 353, 62 S. Ct. 1171, at 1173, this court said:

> "Whether a suit arises under a law of the United States must appear from the plaintiff's pleading, not

the defenses which may be interposed to, or be anticipated by it. Petitioner's pleading, which we have summarized, satisfies this requirement since it adequately discloses a present controversy dependent for its outcome upon the construction of a federal statute," (citing cases).

If the plaintiff makes a substantial claim under an Act of Congress, there is jurisdiction whether the claim ultimately be held good or bad. *Louisville & Nashville Railway Company* v. *Rice*, 247 U. S. 201; 38 S. Ct. 429.

The District Court necessarily was required to construe the duty and obligations of respondent under the federal law known as "An Act to Regulate Commerce" and Acts amendatory thereof, and the Transportation Act, as amended. It was also required to construe and determine the obligations and duties, rights and privileges of respondent under the terms of the Railway Labor Act, Title 45, U.S.C.A., Sections 151-163, and the Norris-LaGuardia Act, Title 29, U.S.C.A., Sections 101, 108. All the rights and privileges, duties and obligations, of the parties to this suit depended upon the proper construction and application of the aforesaid Acts of Congress and the Constitution and laws of the United States.

The opinion of the District Court of Appeals in this case (R. 1020-1031) clearly analyzes the rights and duties of respondent under the Interstate Commerce Act and the other federal statutes (R. 1024-1028). The court also quotes from Title 18, U.S.C.A., Sec. 412 (a) (R. 1025-1026), which makes violent interference with such commerce criminal acts.

The decision of the Circuit Court of Appeals is fully supported by the authorities cited in its opinion (R. 1027, 1029, 1030).

The complaint avers that respondent was operating under and bound by the terms and provisions of the Railway Labor Act (R. 4), and petitioners, in paragraph 3 of their answer, admit this allegation (R. 992-993).

The District Court could not decide this case without construing the provisions of the Railway Labor Act, especially those questions relating to whether or not respondent had made every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Section 7 of the Railway Labor Act (May 20, 1926), 44 Stat. 582, Section 157, Title 45, U.S.C.A., provides that "failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise." This provision of the Railway Labor Act is directly involved in this decision by the contention of petitioners that notwithstanding the express provision of that statute respondent was obliged to submit to compulsory arbitration. This assertion made by petitioners as a part of their defense, that respondent did not comply with its statutory duty by refusing to arbitrate, raised a question as to the construction of the Railway Labor Act as applied to the issues in this case, and the trial court decided this question upon the basis of decisions of this court in the *Clerks* and the *Virginian* cases. (281 U. S. 548, and 300 U. S. 515, hereinafter referred to.) (R. 954-955).

This court recognized the equity jurisdiction of federal courts in the following two cases where it considered the constitutionality of the Railway Labor Act, namely: *Texas & N. O. R. Co. et al.* v. *Brotherhood of Railway and S. S. Clerks*, 281 U. S. 548, 50 S. Ct. 427, and *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 57 S. Ct.

592. In each of these cases this court sustained a decree for temporary injunction in favor of employees who were bound by that Act, and enjoined the carrier from the violation of certain provisions of the Act.

The first case was decided after the original Railway Labor Act was passed in 1926, the second in 1937 after the Act was amended in 1934, and after Section 8 (Sec. 108, Title 29, U.S.C.A.) of the Norris-LaGuardia Act was passed by Congress in 1932.

In *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, at 550, 57 S. Ct. 592, at 60, Mr. Justice Stone, speaking for the court upon the question of the jurisdiction of a federal court of equity to entertain a suit for injunction and the propriety of relief under the provisions of the Act, said:

> "Whether an obligation has been discharged and whether action taken or omitted is in good faith or reasonable, are every day subjects of inquiry by courts in framing and enforcing their decrees."

Also, in 300 U. S. 552, 57 S. Ct. 602, this court said:

> "The decree is authorized by the statute and was granted in an appropriate exercise of the equity powers of the court."

If the federal courts have original jurisdiction to entertain a suit by the employees to enjoin the employer (as recognized by this court in the above cases), then the court has jurisdiction to entertain a suit in equity brought by the employer (the railroad) where the subject matter of the suit arises under the Railway Labor Act, and involves the mutual duties and obligations of the railroad and the employees in a labor dispute.

The original Interstate Commerce Act was passed by Congress in 1887, and the first case involving the construc-

tion of the Act, so far as it relates to the duties and obligations of an interstate carrier, was decided on April 3, 1893, by Judge William H. Taft, then a Circuit Judge (later Chief Justice of this court). This was *Toledo, Ann Arbor & North Michigan Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730 (and a companion case in the same volume at 746). Judge Taft, in granting a temporary injunction restraining several railroad defendants and their employees in a labor dispute from refusing to handle cars containing interstate traffic tendered by plaintiff, at page 732 said:

"The jurisdiction of this court to hear and decide the case made by the bill cannot be maintained on the ground of the diverse citizenship of the parties, for the complainant and at least one of the defendants are citizens of the same state. If it exists, it must arise from the subject matter of the suit. The bill invokes the chancery powers of this court to protect the complainant in rights which it claims under the Act of Congress passed February 4, 1887, (24 St. at Large, P. 379) known as the 'Interstate Commerce Act', and an Act amending it passed March 2, 1889, (25 St. at Large, P. 885). These Acts were passed by Congress in the exercise of the power conferred on it by the federal constitution (Article I, Sec. 8, Para. 3) 'to regulate commerce with foreign nations, among the several states, and with the Indian tribes'. Counsel for defendant Arthur contend that the interstate commerce law and its amendments are only declaratory of the common law, which gave the same rights to complainant, and that, therefore, this is not a case of federal jurisdiction. The original jurisdiction of this court extends by Act of Congress passed August 13, 1888, (25 St. at Large, P. 443) to 'all suits of a civil nature, at common law or in equity, * * * arising under the constitution or laws of the United States'.

> * * * It is immaterial what rights the complainant would have had before the passage of the interstate commerce law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States."

There was a violation of this injunction, and contempt proceedings were instituted resulting in the imprisonment of one Lennon. Lennon filed a petition for writ of *habeas corpus*, which was decided by the Circuit Court for the Northern District of Ohio, and the order of contempt affirmed. Lennon appealed from that order direct to this court, where the appeal was dismissed. (150 U. S. 393; 14 S. Ct. 123.)

Lennon then appealed the contempt order to the Circuit Court of Appeals for the Sixth Circuit, where the decree of the lower court was affirmed. Certiorari was granted by this court, and on hearing here it was held that Judge Taft had jurisdiction to enter the original decree for injunction, and Mr. Justice Brown in that case, *Ex parte Lennon*, 166 U. S. 548, 17 S. Ct. 658, at 660, said:

> "* * * we think the bill exhibited a case arising under the constitution and laws of the United States, as it appears to have been brought solely to enforce a compliance with the provisions of the interstate commerce act of 1887, and to compel the defendants to comply with such act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to receive from complainant, for transportation over their lines, any cars which might be tendered them. It has been frequently held by this court that a case arises under the constitution and laws of the United States

whenever the party plaintiff sets up a right to which he is entitled under such laws, which the parties defendant deny to him; and the correct decision of the case depends upon the construction of such laws."

At pages 18 and 19 of the petition, petitioners discuss the decision of this court in the *Lennon* case, and state that it was decided almost a half Century before the Norris-LaGuardia Act, which prohibits an injunction to compel employees to work under any circumstances. This Court in the *Lennon* case did not pass upon the question as to whether it had power to compel the performance of a contract for service, as inferred by petitioners here (pp. 18, 19). But this Court did decide the question of jurisdiction of the federal courts to entertain a suit for injunction upon the basis *that Congress imposed upon interstate carriers the duty to furnish reasonable facilities for the interchange of interstate traffic, and that the acts of the defendants in that case directly affected a right and duty of the carrier arising under the Commerce Act.*

In instant case respondent at no time has asserted that any court has jurisdiction to compel an employee to continue in service or to perform any service, as that would be contrary to the express provisions of the Railway Labor Act. The injunction in instant case expressly limits its effect to the interference with interstate traffic by the striking employees as a result *of their violent acts or threats of violence*, and the court clearly stated, not only in his oral opinion in deciding the case, but in the order for injunction, *that it had no effect whatsoever upon petitioners' right to strike or their right to refuse to work.* (R. 981)

It is said in the petition (P. 19) that the *Lennon* case was completely different from this case because it was bottomed on the statutory violation by the defendants in refusing to

accept interstate freight, and that the purpose of that suit was to force acceptance of freight. Petitioners recognize by their argument, that Congress did impose obligations upon interstate carriers, the violation of which give the federal courts jurisdiction in equity cases. A careful analysis of the issues in instant case will demonstrate that the fundamental principle in this case, and in the *Lennon* case, is exactly the same.

It was the duty of respondent under the Commerce Act to deliver freight and furnish reasonable facilities for the interchange of interstate freight with other carriers. The complaint here shows, and the evidence proves, that respondent was prevented on many occasions, specifically described by the testimony of the witnesses, in making delivery of interstate freight to other carriers due to the fact that petitioners, *not by refusing to work, but by force and violence, and by threats of force and violence*, prevented respondent to make these deliveries and to perform its duties and obligations.

The purpose of the present action was simply to forbid striking employees (petitioners) from interfering with the movement of interstate freight *by reason of their acts of violence and threats of violence.* The decree in this case granting the temporary injunction in no wise violates either the letter or spirit of the Norris-LaGuardia Act, and it in no way interferes with the right of petitioners to strike. It does not in any way seek to compel them to continue to work under any circumstances.

What has been said above with reference to the *Lennon* case applies equally to the comment of petitioners on *Wabash Co.* v. *Hannahan*, 121 Fed. 563, and the other cases which they discuss. Petitioners are incorrect in assuming as a basis for the argument with reference to these cases, that the injunction in instant case was maintained to restrain the Brotherhood leaders and employees from strik-

ing for a wage increase, or that the injunction was contrary to the letter and spirit of the Norris-LaGuardia Act.

No Federal Court has yet held that an injunction may not be granted restraining an employee from violence and threats of violence, so long as that striking employee's rights to strike are not interfered with by the writ. That is all that the Norris-LaGuardia Act attempts to accomplish, namely: that there shall be no injunction restraining rights of employees to strike, or interfering with their union activities. The Court, having protected these fundamental rights, then has the right and power to prevent violence and threats of violence against the employer.

The order in instant case from which the appeal was taken, expressly reserves all of the rights guaranteed to an employee by the Norris-LaGuardia Act, and these rights are clearly and specifically set out in the order for temporary injunction. (R. 981-982).

In *Macon Grocery Co.* v. *Atlantic C. L. R. Co.*, 215 U. S. 501, 30 S. Ct. 184, at 186, 187, this Court approved the rule announced in the above case by Judge Taft.

In *Mulford* v. *Smith*, 307 U. S. 38, at 46, 59 S. Ct. 648 at 651, this Court speaking through Mr. Justice Roberts said, page 46:

> "Before coming to the merits we inquire whether the court below had jurisdiction as a federal court or as a court of equity. Though no diversity of citizenship is alleged, nor is any amount in controversy asserted so as to confer jurisdiction under sub-section (1) of Section 24 of the Judicial Code, the case falls within sub-section (8) which confers jurisdiction upon District Courts 'of all suits and proceedings arising under any law relating to commerce'."

In the recent cases of *Southern Pacific Co.* v. *Peterson* and *A. T. & S. Fe. Ry. Co.* v. *same*, 43 F. (2d) 198, the court said at 201:

> "If, as alleged in the bills, the interstate traffic over the plaintiffs' lines is hindered, delayed and burdened to such an extent as to amount to an unlawful interference with or regulation of interstate commerce, then a cause of action exists calling for equitable relief. These allegations of the bill are specifically denied by the defendant. An issue is thereby tendered and a case presented of which the federal court has jurisdiction."

In the case of *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, at 25, 33 S. Ct. 410, at 412, the Court said:

> "• • • if the plaintiff really makes a substantial claim under an Act of Congress, there is jurisdiction whether the claim ultimately beheld good or bad."

The petitioners in their petition (pages 22-23) have misconstrued the effect of the decision of the Circuit Court of Appeals. In effect they say that if a federal statute imposes a duty upon a person, that judicial interpretation may read into that statute a provision that such person has an implied federal right to be free from any act tending to obstruct or prevent the performance of that duty, and a federal court will hear cases seeking remedies for a breach of such an implied right.

In the first place, the premise from which this argument stems has no application to instant case. The rights and duties of an interstate carrier are in no way implied. These rights have been *definitely fixed* by statutory enactment beginning with the passage of the original Interstate Commerce Act in 1887. In the second place, petitioners overlook the fact that the Constitution of the United

States gave power to Congress to regulate interstate commerce, and Congress entered the field of regulation of commerce between the States when it passed the act of 1887, and by so doing excluded all interference by a state in that field.

All of the cases above cited show that the federal courts have recognized that Congress, by the passage of the Interstate Commerce Act in 1887, took *exclusive jurisdiction* in determining the duties and obligations *of carriers of interstate freight*, and no court, State or Federal, has ever held that any of the duties and obligations of carriers under that Act are subject to state legislation or regulation by a state.

In *Railroad Commission* v. *Worthington*, 225 U. S. 101, 32 S. Ct. 653, at 655, this Court said:

> "It is not necessary to review the cases in this court which have settled beyond peradventure that the national government has exclusive authority to regulate interstate commerce under the Constitution of the United States."

Petitioners at pages 22 and 23 of their brief discuss the large volume of litigation in state courts resulting from automobile negligence cases, and say that federal law imposes upon common carriers by truck the duty to furnish transports and facilities, and conclude with the unwarranted assertion that under the reasoning of the Circuit Court of Appeals in instant case a trucker would have a federal right to be free from *any act* obstructing or impeding the movement of the truck, and a remedy in the federal courts for his damage.

This argument is unsound and is completely answered by the decision of the Circuit Court of Appeals of the Seventh Circuit in *Sharp* v. *Barnhart*, 117 F. (2d) 604, in the opinion by Judge Evans, which case involved the

stoppage of a motor truck. In this opinion, Judge Evans very clearly draws the distinction between the right of the operator of a truck engaged in interstate commerce and one which is under the terms and provisions of the Motor Carrier Act of Congress, and there points out that the operation of motor vehicles on the public highways of the State are subject to the local supervision and local laws with reference to the operation of said vehicles. Also see *Welch Co.* v. *New Hampshire*, 306 U. S. 79, at 85, 59 S. Ct. 438, at 441; 83 L. Ed. 500, and the cases there cited.

A motor truck is operated upon a public highway which is used by the public generally either for the purpose of hauling interstate freight, intra-state freight or the operation of private motor cars, and Congress by passing the Motor Carrier Act of 1935, 49 U.S.C.A. 301 *et. seq.*, did not intend to supersede or suspend the exercise of the reserve powers of a State in controlling all traffic upon public highways, and the Motor Carrier Act was not extended to cover ordinary traffic safety regulations, but these regulations were left to the State.

The distinction between the Interstate Commerce Act as applied to railroads, and the Motor Carrier Act of 1935, is one of the scope of assumption of authority and control by Congress. Under the Interstate Commerce Act, Congress assumed and has retained the exclusive field, to regulate and control, while in the Motor Carrier Act, Congress has taken jurisdiction only in a limited manner.

Under all of the decisions of this court and the Circuit Courts of Appeal, the distinction here made has been recognized, and the federal courts are vested with jurisdiction in cases arising in *this exclusive field of interstate transportation by railroads.*

The concern of counsel for petitioners that the decision of the Circuit Court of Appeals in instant case will result

in clothing federal courts with further power to consider a great volume of motor vehicle cases is unfounded and unwarranted. As pointed out by Judge Evans in *Sharp v. Barnhart*, 117 F. (2d) 604, the federal courts are vested with jurisdiction in motor carrier cases only where the vehicle owner has fully complied with the provisions of the Federal Act, and as he so clearly states in that opinion, the motor vehicle carrier, even though transporting interstate commerce, is not under the protection of the federal courts if he has not brought himself within the qualifications required by that Act.

Under all the above cases and the facts alleged in the complaint in this case and proven on the trial, it clearly appears that this suit really and substantially involved a dispute or controversy respecting the construction or effect of the Interstate Commerce Act, the Transportation Act, the Railway Labor Act, the War Utilities Act, and the Norris-LaGuardia Act, and that the result depended upon such determination by the District Court. Under such circumstances the District Court had original jurisdiction of the controversy.

III.

The clear and conclusive evidence offered by respondent shows that the public officers charged with maintaining order were unable or unwilling to furnish adequate protection for respondent's employees and its property against the violence and threats of violence of petitioners. The findings of the District Court, approved by the Circuit Court of Appeals, are binding upon petitioners.

Petitioners made no effort to dispute the voluminous evidence offered by respondent proving that petitioners were guilty of violence, threats of violence and interfer-

ence with the movement of interstate trains. Not a single witness was called by petitioners to dispute the facts that the petitioners, in over fifty separate instances, did interfere with the operation of interstate trains and the movement of interstate freight, preventing respondent from the performance of its duty under the Interstate Commerce Act, as an interstate carrier of freight. (See Exhibit 21 attached to this brief as an appendix, giving the times and places upon the railroad where respondent proved violence interfering with the movement of trains.) Under this point petitioners challenge the sufficiency of the evidence to show that the public officers were unable or unwilling to furnish adequate protection, as required by Section 7 of the Norris-LaGuardia Act.

The trial judge, after sitting for almost two weeks and hearing a hundred and seven witnesses in the case, found against petitioners on this point, and made special written findings of fact that respondent had proved that the public officers charged with the duty of protecting respondent's property were unable or unwilling to furnish adequate protection. These findings have been concurred in by the Circuit Court of Appeals (R. 1028-1029), and the petitioners do not show that these findings of the two courts are erroneous or unsupported by the evidence. The petition simply makes an assertion without pointing out clear error committed by the District Court or the Circuit Court of Appeals.

The District Court (R. 975) made the specific finding that the evidence proved the failure, inability or unwillingness of the public officers to furnish adequate protection to the property of the plaintiff and the movement of its trains, and the Circuit Court of Appeals concurred in the findings, and has stated the facts upon which it based its findings (R. 1028-1029). The Circuit Court of Appeals

also found (R. 1026) and stated the facts on that subject as follows:

> "In the instant case, the acts complained of were so violent that plaintiff was forced to abandon temporarily its train service."

In *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, at 542, 57 S. Ct. 592, at 596, Mr. Justice Stone said:

> "The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by evidence. We accordingly accept them as the conclusive basis for decision," (citing cases).

In the case of *Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, at 558, 50 S. Ct. 427, at 429, Mr. Chief Justice Hughes said:

> "On the questions of fact, both courts below decided against the petitioners. Under the well established rule, this court accepts the findings in which two courts concur unless clear error is shown," (citing cases).

See also *Alabama Power Co. v. Ickes*, 302 U. S. 464, at 477, 58 S. Ct. 300, at 303.

It should also be noted, in support of the findings of fact on this point, that the Circuit Court of Appeals, as well as the District Court, found that the acts of violence and threats of violence upon respondent were spread over the entire distance of the length of the railroad from the State of Iowa to the State of Indiana. Under such circumstances, even though a sheriff in one of the eleven counties in Illinois in which this road operates was entirely willing to cooperate within his jurisdiction, viz, his county, his protection, even though effective there, would be of no

consequence in the other ten counties in the state through which the railroad was operating.

In *Newton* v. *Laclede Steel Co.*, 80 Fed. (2d) 636 (7th Circuit), December 17, 1931, that court held that the term "public officials" includes the city and county officials but not the Governor of the state.

Both the District Court and the Circuit Court of Appeals have found that the record contains substantial evidence showing the public officers under duty to protect respondent were either unable or unwilling to furnish adequate protection. Under the authorities above cited, such concurrent findings of fact, not being shown to be plainly erroneous or unsupported by evidence, are accepted as conclusive. These findings show respondent's complete compliance with the requirements of Section 7 (107, Title 29, U.S.C.A.) of the Norris-LaGuardia Act.

IV.

The undisputed evidence offered by respondent shows it complied with all the obligations imposed on it by the Railway Labor Act and Section 108 of the Norris-LaGuardia Act. The findings of the Disctrict Court, approved by the Circuit Court of Appeals, are binding upon petitioners.

On the question as to whether respondent had complied with the provisions of the Railway Labor Act as a condition to its right to seek injunctive relief, the District Court and the Circuit Court of Appeals found the facts as follows, to-wit:

> "On December 17, 1940, and January 7, 1941, plaintiff delivered its proposed schedules of rules, working conditions and rates of pay. The services of the Mediation Board were invoked on January 15, 1941

and attempts to reach an agreement between the parties continued by the Board until November 21, 1941, when both parties refused to arbitrate and the Board terminated its mediation efforts. Prior to this, plaintiff had submitted its revised and amended proposals of rates of pay, rules and working conditions on November 3, 1941. On December 21, 1941 plaintiff notified defendants that its revised schedules would go into effect on December 29, 1941, and at 12:01 A. M. December 29, 1941 defendants struck. Defendants knew of plaintiff's revised schedule November 3, 1941, and the Mediation Board gave written notification of its withdrawal from the mediation proceedings on November 21, 1941. Both events occurred more than 30 days prior to the date when plaintiff's orders were put into effect." (R. 1031).

Following this finding of fact, the Circuit Court of Appeals then makes its final conclusion as follows:

"Since section 155 was the guiding section when the controversy was submitted to the Mediation Board, and more than 30 days had elapsed after the Board's withdrawal before any change in plaintiff's rates of pay, rules and working conditions, plaintiff complied with the Act." (R. 1031).

The District Court made a specific finding of fact (R. 970), Par. (d):

"That the plaintiff has in good faith complied with all of the provisions of the Railway Labor Act in endeavoring to reach an agreement with the Brotherhoods and its employees; that the plaintiff has complied with all its obligations imposed upon it by the laws of the United States relating to labor disputes."

The above concurrent findings of fact of the two courts below are not shown by petitioners to be erroneous or un-

supported by substantial evidence, and under the well established rule of this court these findings are accepted as unassailable. (*Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515 at 542, 57 S. Ct. 592 at 596; *Texas & N. O. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548 at 558, 50 S. Ct. 427 at 429; and *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 at 477, 58 S. Ct. 300 at 303.)

Petitioners admit in their brief (page 29) that respondent was under no legal compulsion to submit to arbitration. Taking this as their construction of Section 7 (Sec. 157, Title 45 U.S.C.A.) of the Railway Labor Act, which provides: "The failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise", there is no merit whatsoever in their argument that respondent could not enjoin petitioners from acts of violence and threats of violence.

If respondent complied with the provisions of the law, then it has performed all conditions required of it for injunctive relief.

Both lower courts have found that a good faith effort was made by respondent to settle the dispute. If respondent was not obliged to submit to compulsory arbitration, there was no other means of settling or attempting to settle the dispute, and especially in view of the fact that the undisputed evidence in the record shows that the Brotherhoods advised the representatives of respondent before the mediation proceedings had formally terminated that there was no rate of pay to which they would agree under the schedule respondent submitted on Novem. 3, 1941.

This schedule did not become effective for thirty days after November 21, 1941, and in fact was not actually put

into effect until December 29, 1941. More than the thirty days statutory period had elapsed after the formal termination of the mediation proceedings before this schedule became effective.

In addition thereto, Section 5 (Sec. 155, Title 45 U.S.C.A.) of the Railway Labor Act, provides that during the thirty day period after the termination of the mediation proceedings nothing shall change the finality of the termination of the mediation proceedings, except the appointment of an emergency board under Section 10 (Sec. 160, Title 45 U.S.C.A.) of the Railway Labor Act, or *an agreement of the parties to arbitrate.*

The record in this case shows that at the time of the withdrawal of the mediator on November 7, 1941, respondent urged the Mediation Board to request the President to appoint an emergency board as provided in Section 10, and this request was made repeatedly until the strike occurred. No action was taken by the Mediation Board to request the President to appoint an emergency board as contemplated by the statute.

The Circuit Court of Appeals made the following finding of fact:

> "An examination of the record indicates, however, that it made an effort by mediation to reach a satisfactory arrangement with defendants, and that, after nearly a year of negotiations, the Mediation Board terminated the proceedings after arbitration proposals submitted by it were refused by both parties. Plaintiff further sought to reach a satisfactory agreement with defendants by suggesting that an emergency board be appointed by the President, as well as that an impartial committee be appointed to examine the dispute. It is thus apparent that there was no lack of good faith by plaintiff to bar its right to an injunction because of refusal to arbitrate." (R. 1029).

This court has definitely decided that the obligation upon a railroad with reference to arbitration in a labor dispute is a voluntary choice, and not compulsory. The first case was *Texas & N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 50 S. Ct. 427 (decided May 26, 1930), where Mr. Chief Justice Hughes (281 U. S. 564, 50 S. Ct. 431) said:

> "While adhering in the new statute to the policy of providing for the amicable adjustment of labor disputes and for *voluntary submissions to arbitration as opposed to a system of compulsory arbitration*, Congress buttressed this policy by creating certain definite legal obligations. * * * *The arbitration is voluntary*, but the award pursuant to the arbitration is conclusive upon the parties as to the merits and facts of the controversy submitted". (Italics ours.)

The second case was decided after the amendment of the act in 1934, and was *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 57 S. Ct. 592 (decided March 29, 1937), where Mr. Justice Stone, at 605, said:

> "The provisions of the Railway Labor Act invoked here neither compel the employer to enter into any agreement, nor preclude it from entering into any contract with individual employees. They do not 'interfere with the normal exercise of the right of the carrier to select its employees or to discharge them.' See the *Railway Clerks Case, supra*, 281 U. S. 548, 571, 50 S. Ct. 427, 434, 74 L. Ed. 1034."

The construction of the provisions of the Railway Labor Act in instant case by the Circuit Court of Appeals is squarely in line with the construction placed upon it by this court in the above cases, so far as the duty to arbitrate is concerned.

Petitioners do not at any point in their petition or brief say that respondent failed to mediate the dispute, as required by the provisions of the Railway Labor Act. There is no criticism by petitioners of the manner of the mediation, nor is there the slightest suggestion that respondent failed to comply in good faith with all of the requirements of the act *relating to mediation*.

The Railway Labor Act contemplates the settlement of labor disputes through conferences, or mediation, or voluntary arbitration. The Norris-LaGuardia Act requires that every reasonable effort to settle the dispute be made either by negotiation or with the aid of any governmental machinery of mediation or voluntary arbitration. There is no requirement in either Act that the employer must mediate and also submit to compulsory arbitration.

The Circuit Court of Appeals of the Fifth Circuit in *Mayo* v. *Dean*, 82 F. (2d) 554-556 (1936) passed squarely upon the question raised in instant case as to whether injunctive relief should be granted to a plaintiff in an equity case, in view of the provisions of Section 8 (Sec. 108, Title 29 U.S.C.A.) of the Norris-LaGuardia Act, where mediation was the means adopted and pursued to a conclusion without arbitration, and the court in passing upon that question there said:

> "Conceding, without so deciding, that the act applies, we consider it was fully complied with by complainant by availing himself of the services of the mediator of the Department of Labor. He was not obliged to propose both mediation and arbitration. One or the other would be sufficient."

Respondent also urges that where violence and threats of violence are committed by the employees, Section 8 (Sec. 108, Title 29 U.S.C.A.) of the Norris-LaGuardia Act has no application. (*Cater Construction Co.* v. *Nisch-*

witz, 111 F. (2d) 971 (C. C. A. 7); *United Electric Co* *Co.* v. *Rice,* 80 F. (2d) 1 (C. C. A. 7); *Newton* v. *Lacle* *Steel Co.,* 80 F. (2d) 636 (C. C. A. 7), and this holdi was adhered to in instant case by the Circuit Court Appeals (R. 1030).

The Seventh Circuit Court of Appeals in *United Ele* *tric Coal Co.* v. *Rice, et al.,* 80 F. (2d) 1, held that t Norris-LaGuardia Act (29 U.S.C.A. 108) limiting pow of a federal court of equity to grant injunctions in lab dispute cases, does not prevent the court from protecti property from wilful destruction. Certiorari was deni by this court in that case. (*Rice* v. *United Electric Co* *Co.,* 297 U. S. 712, 56 S. Ct. 590.)

CONCLUSION.

WHEREFORE, respondent respectfully prays that the p tition for certiorari be denied.

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Attorneys for Respondent

PAGE

CASES CITED BY RESPONDENT (continued).

STATUTES CITED BY RESPONDENT.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 28

THE BROTHERHOOD OF RAILROAD TRAINMEN, ENTERPRISE LODGE NO. 27, ET AL.,
Petitioners,

vs.

TOLEDO, PEORIA & WESTERN RAILROAD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief of Respondent.

OPINIONS OF THE LOWER COURT.

The Seventh Circuit Court of Appeals' opinion is reported in 132 F. (2d) 265-275, and is set forth in the record (R. 1020-1031). No opinion of the District Court is reported, but the statement of the District Judge made at the time the temporary injunction was granted appears in the record (R. 954-957).

JURISDICTION OF THIS COURT.

Certiorari was granted herein on April 19, 1943.

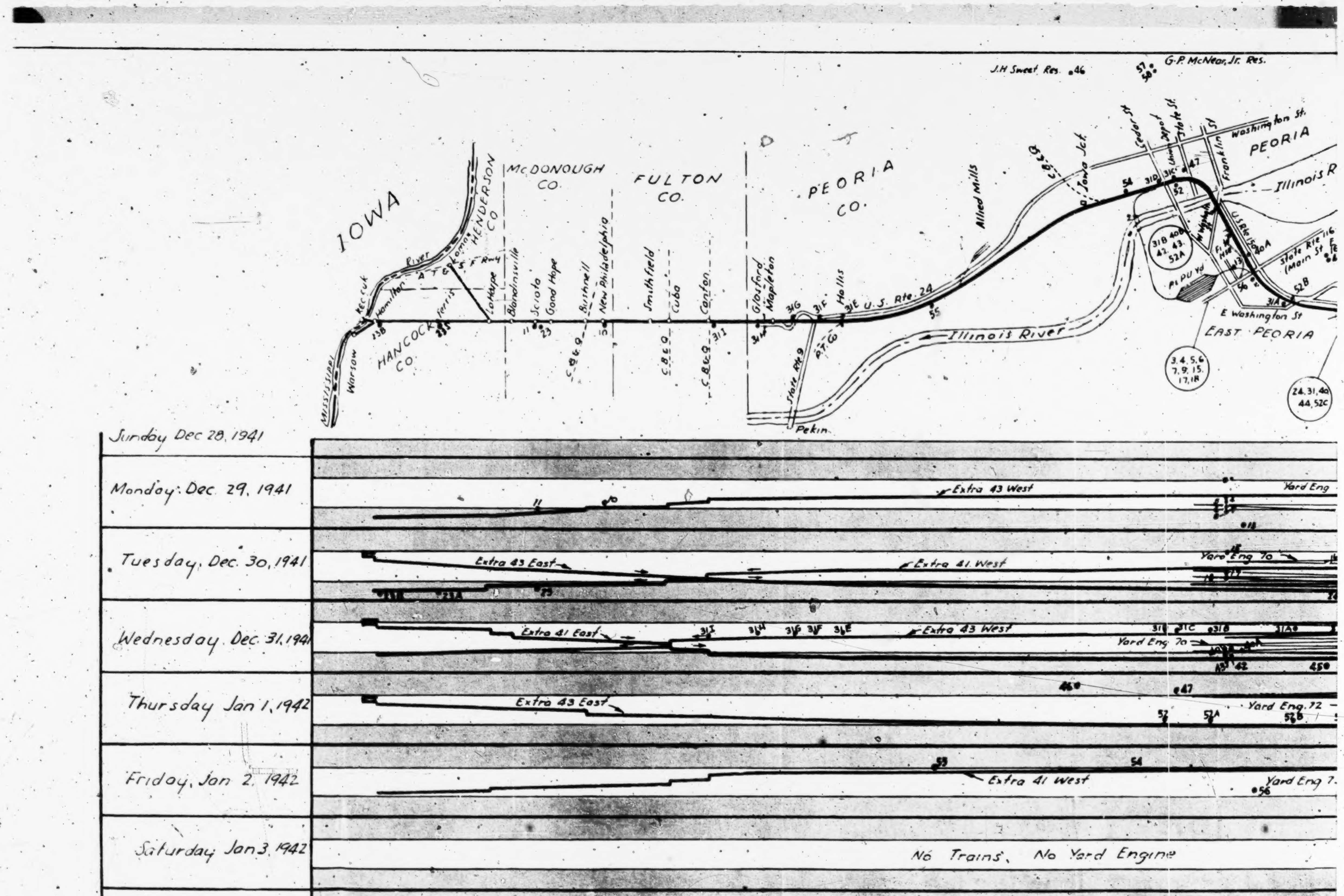
APPENDIX

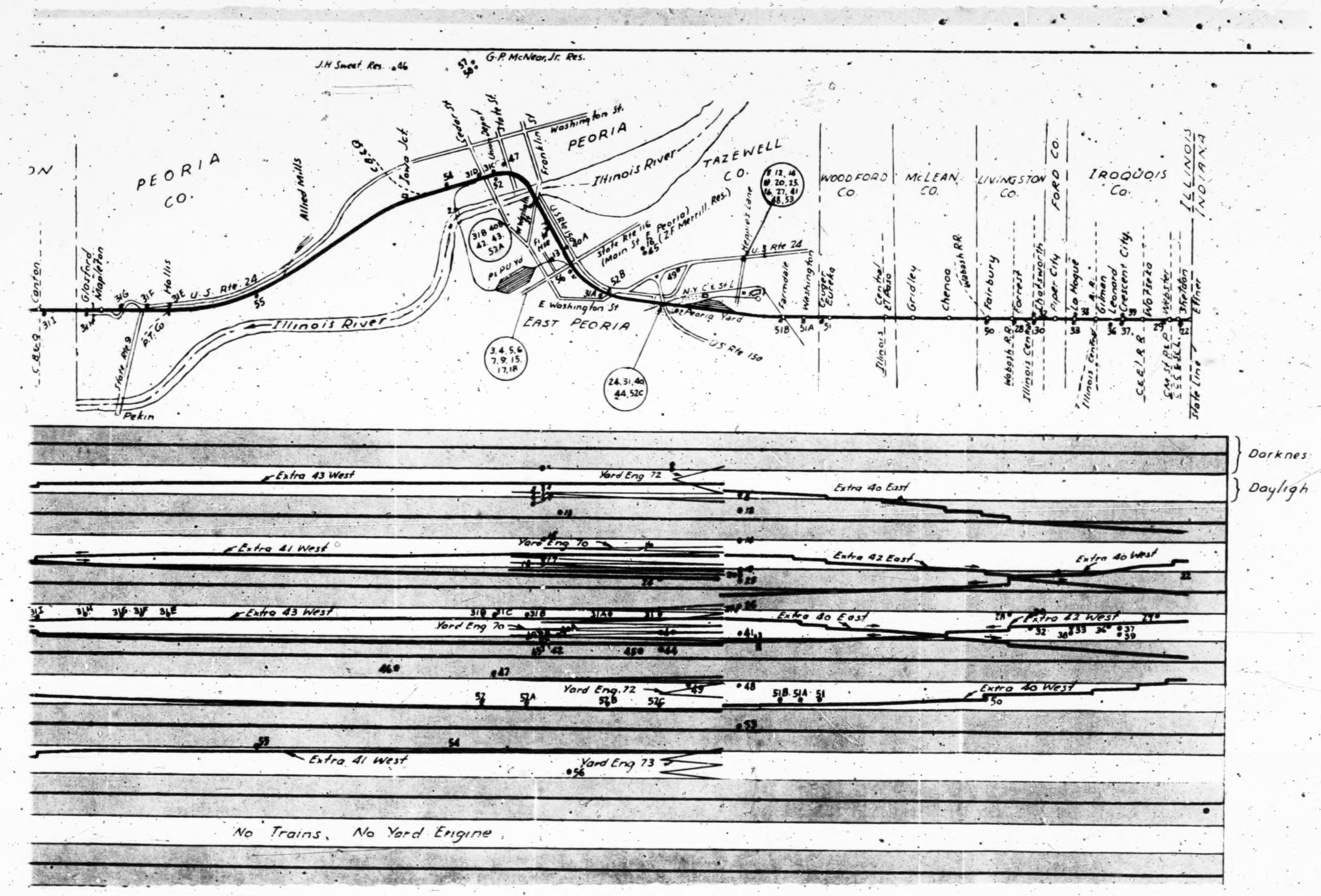
PLAINTIFF'S EXHIBIT 21

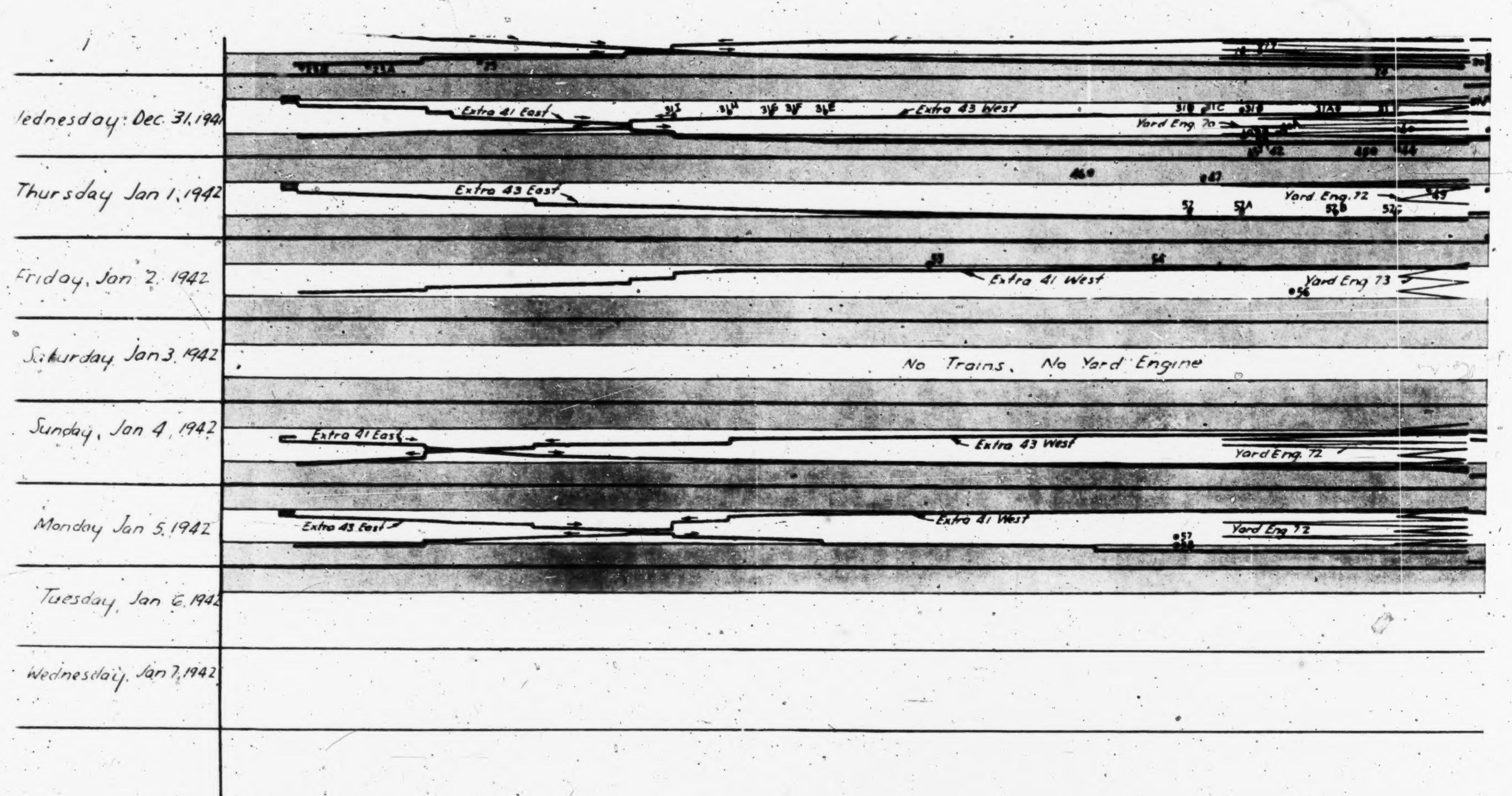
CHART SHOWING OPERATION

TOLEDO, PEORIA & WESTERN RAILROAD

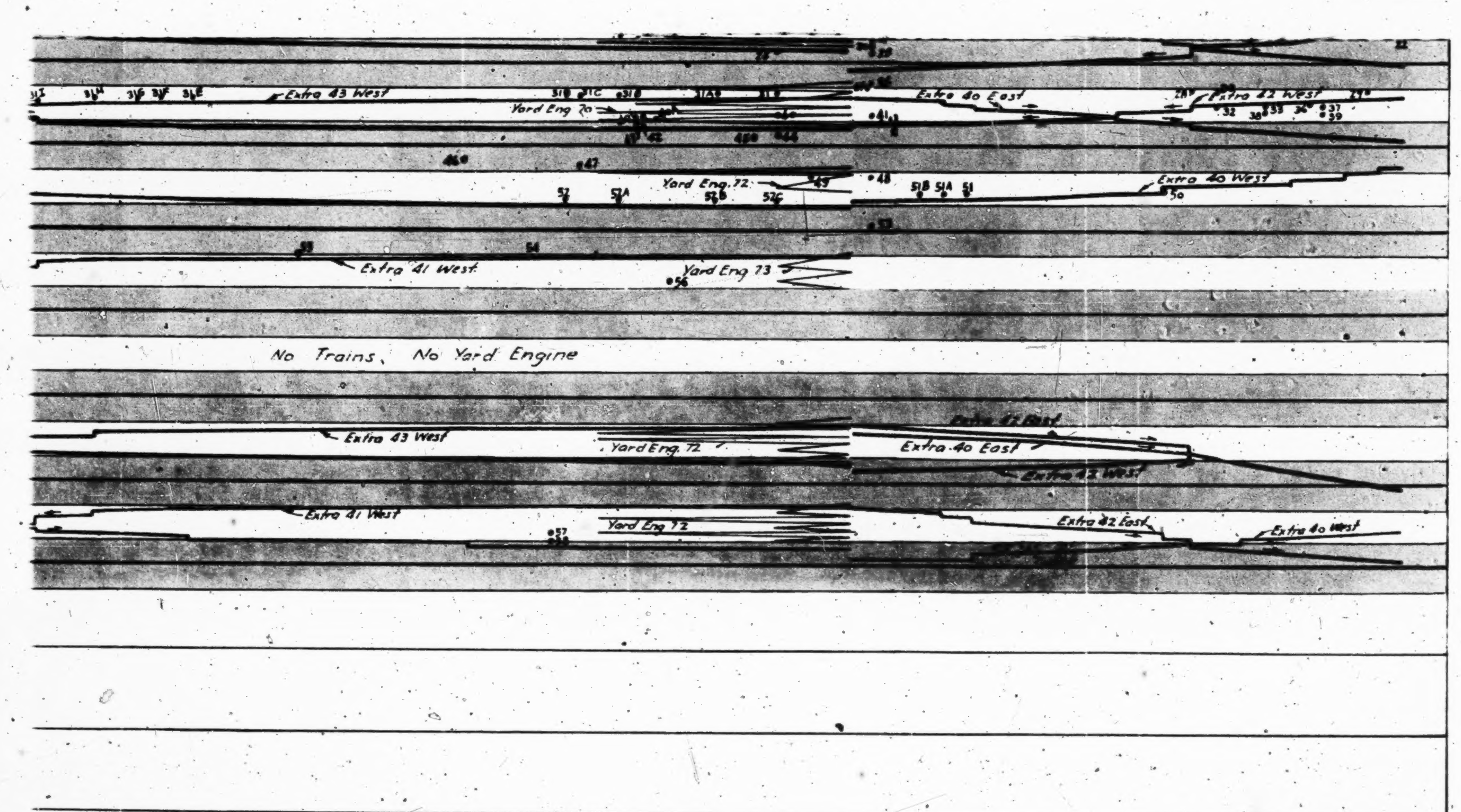
DECEMBER 29, 1941 TO JANUARY 5, 1942







Note:
• Denotes act of violence, threat or other interference to the operation of the Railroad.



Note:
• Denotes act of violence, threat or other interference to the operation of the Railroad.

CHART SHOWING OPERATION
TOLEDO, PEORIA & WESTERN RAILROAD
DECEMBER 29, 1941 TO JANUARY 5, 1942

C.E.O. PEORIA, ILLINOIS — JANUARY 6, 1942

Drawn By: R.F.Mc — Correct: [signature]

NO SCALE

P I F 3-M-88